84-969

No.

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ALEXANDER L. STEVAS,
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Supreme Court of the United States
October Term, 1984

JAMES POURNARAS,
Petitioner,

-vs-

CONSTANCE POURNARAS,
Respondent.

On Writ Of Certiorari To The Supreme Court
Of The State Of Ohio

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTIONS PRESENTED

1. Do natural parents who have participated in the rearing of the child during their marriage have a fundamental constitutional right to the custody of the child following a divorce which cannot be denied by the State absent a showing of harm to the child?

2. Is Ohio Revised Code Section 3109.04 unconstitutional as applied as a denial of equal protection when child custody awards are based solely upon the female parent's traditional role as the child's caretaker?

3. Is Ohio Revised Code Section 3109.04(A) unconstitutional on its face as a denial of due process when it required the best interests of the child standard in the determination of an award of sole custody in a contested divorce proceeding between two parents who have participated in the rearing of the child?

PARTIES TO PROCEEDING

The parties to this proceeding are those contained in the caption of the case, to wit: JAMES POURNARAS AND CONSTANCE POURNARAS.

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The Judgment of the trial court appears in the Appendix hereto. The opinion of the Court of Appeals is unreported and also appears in the Appendix. The order of the Ohio Supreme Court overruling the Petitioner's Motion for the Court of Appeals to Certify its Record also appears in the Appendix.

JURISDICTION

The order of the Ohio Supreme Court overruling the Motion to Certify was entered on September 12, 1984, and this Petition for Certiorari was timely filed. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution and Ohio Revised Code Section 3109.04 which appear in the Appendix hereto.

STATEMENT OF THE CASE

On January 8, 1980, the Respondent, Constance Pournaras, filed a Complaint for Divorce and Other Relief against the Petitioner in the Cuyahoga County, Ohio, Court of Common Pleas, Division of Domestic Relations.

From his initial pleadings, the Petitioner sought joint custody of the parties' only child.

The Petitioner had a nationally known expert from Philadelphia, Pennsylvania, Dr. Stanley Clawar, a psychotherapist and sociologist, testify in his behalf. Dr. Clawar testified that he had evaluated the parties (Tr. 683), that the parties' child

would be harmed without the equal participation of both parents in raising her (Tr. 716). Counsel for Petitioner further proferred an article by Dr. Clawar which stated that joint custody was the preferred award even without an agreement of the parties. (Tr. 1083).

The Petitioner also had a local psychologist testify in his behalf, Dr. Albert Paolino, who also evaluated the parties and concurred in Dr. Clawar's opinions and recommendations (Tr. 502, 530). Dr. Paolino also testified that the Petitioner was the better parent (Tr. 502); and he acknowledged the Respondent's history of aggressive behavior and her voluntary attendance at Parents' Annonymous (Tr. 503.)

At the trial, counsel for the Petitioner attempted to introduce a study, Divorce Awards And Outcomes, Pattern and Change in Cuyahoga County, 1965 to 1978, produced by the Federation for

Community Planning and the Cleveland Women's Council, in conjunction with the Cuyahoga County Court of Common Pleas, Division of Domestic Relations, which showed that in a substantial majority of contested custody cases that custody was awarded to the female parent. The purpose of presenting such evidence as to show that a sexual bias existed in the court in child custody awards. (Tr. 1077-1078).

Counsel for Petitioner also stated at the trial that a fundamental right was involved, and that the requirement that both parents agree to joint custody was arbitrary, unjust and unconstitutional. (Tr. 738-739).

Several times during the trial, the judge stated that he wanted to award joint custody, but that he was unable to do so because the Ohio joint custody statute, Ohio Revised Code Section 3109.041, required an agreement of the parties. As the trial judge stated on page 737 of the transcript:

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...Now from day one you have insisted on proceeding in this way and I told you I would prefer joint custody. I agree with all this testimony, but the law says the condition hasn't been met...

On October 25, 1982, the trial judge issued his final judgement (App. A-19 to A-26) which awarded custody of the child to the Respondent.

The Petitioner filed a timely appeal to the Court of appeals for the Eighth Appellate District of Ohio. The Petitioner's Second and Fifth Assignments of Error were as follows:

II. THE TRIAL COURT ERRED IN REFUSING TO CONSIDER JOINT CUSTODY THEREBY DENYING APPELLANT HIS CONSTITUTIONALLY PROTECTED AND FUNDAMENTAL RIGHT TO PARENTAL AUTONOMY WITHOUT SHOWING AN OVERRIDING AND COMPELLING STATE INTEREST

A. APPELLANT'S PARENTAL RIGHTS ARE A FUNDAMENTAL RIGHT

B. THIS FUNDAMENTAL RIGHT EXISTS IN THE PARENT INDEPENDENTLY OF THE TRADITIONAL FAMILY UNIT (MARRIAGE)

C. JOINT CUSTODY AS A FUNDAMENTAL RIGHT

V. THE AWARD OF SOLE CUSTODY TO THE APPELLEE WAS DISCRIMINATORY AND IN VIOLATION OF EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION

The Court of Appeals issued its Opinion on November 17, 1983. (App. A-2 to A-19). On page 7 thereof, the Court stated:

Secondly, appellant argues that the "best interest of the child" standard is unconstitutional since the sole compelling interest for which a state may override parental rights is the state's interest in protecting a child from harm. We disagree with appellant's contentions and hold Sec. 3109.04(A) constitutional.

We do agree with the appellant that the relationship between a parent and child is a fundamental right protected by the United States Constitution. Quilloin v. Walcott, 434 U.S. 246, reh'g denied, 435 U.S. 918 (1978). We disagree, however, that joint custody is necessarily a fundamental right. At the time of a divorce, both parents have an equal right to custody. The Court has the authority to award custody to one parent instead of the other parent if it is in the best interests of the child to do so. Ohio Rev. Code Ann. Sec. 3109.04(A) (Page Supp. 1982). Courts have traditionally had this authority, and appellant does not challenge this authority.

Joint custody is a liberalization of the former traditional award of custody to only one parent. Appellant does not challenge the legislature's granting of authority to the courts to now consider a joint custody award. Appellant does challenge the condition precedent to such a consideration by the court, i.e., that both parents request joint custody.

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The Court of Appeals further held on page A-12 that it was reasonable for the state to require the consent of both parties for an award of joint custody.

The Petitioner then filed a timely appeal to the Ohio Supreme Court. The Petitioner's First Proposition of Law to the Ohio Supreme Court stated:

> JOINT CUSTODY IS A FUNDAMENTAL RIGHT OF ALL PARENTS, THAT FAILING A SHOWING THAT SUCH AN AWARD IS HARMFUL TO THE CHILDREN AT ISSUE, MUST BE PROTECTED.

On September 12, 1984, the Ohio Supreme Court overruled a Motion for the Court of Appeals to Certify its Record and denied review to the Petitioner.

REASONS FOR GRANTING THE WRIT

1. OHIO REVISED CODE SECTION 3109.04(D), THE OHIO JOINT CUSTODY STATUE, IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT PERMITS A PARENT TO DENY THE OTHER PARENT HIS OR HER FUNDAMENTAL CONSTITUTIONAL RIGHT TO THE CUSTODY OF HIS OR HER CHILDREN MERELY BY WITHHOLDING HIS OR HER CONSENT TO JOINT CUSTODY

In Caban v. Mohammed, 441 U.S. 380, 397, (1979), Justice Steward stated:

> Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, ct Smith v. Organization of Foster Families, 431, U.S. 816, 862-863 (Opinion concurring in judgment), it by no means follows that each unwed parent has any such right. Parental rights do not spring full-blown from the biological connection be-tween parent and child. They require rela-tionships more enduring. (Emphasis added)

The Petitioner herein participated in the rearing of the child during his marriage, and the effect of the trial court's order was to deprive him of his custodial rights.

The fact that the realtionship between a divorced parent, who has participated in the rearing of the child, and such child, is a fundamental constitutional right, is shown in the law review article Joint Custody As A Fundamental Right, by Ellen Canacakos, Arizona Law Review, (1981). Vol. 23 p. 785. For the convenience of the Court, the entire article has been reproduced and will be found in the Appendix at A-36to

A-51. Her opinion is based upon a series of cases emanating from this Court which include the following: Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Smith v. Organization of Foster Families for Equality and Reform, 431, U.S. 816 (1977); and Quilloin v. Walcott, 434, U.S. 246 (1978).

A state must use the least restrictive alternative in the deprivation of a fundamental constitutional right, see Shelton v. Tucker, 364 U.S. 479, 488 (1960); and a natural parent who has participated in the rearing of a child and has established a parent-child relationship, cannot be deprived of his or her right to custody unless the state can prove harm to the child.

Ohio Revised Code Section 3109.04(D) is unconstitutional on its face because it

permits a parent to deny the other parent a fundamental constitutional right merely by withholding consent to joint custody. Nine out of ten of sole custody awards are granted to the female parent, the requirement of consent perpetuates the practice of awarding custody based upon the traditional assumed role of females as the child's caretaker.

II. AN AWARD OF SOLE CUSTODY TO A FEMALE PARENT SOLELY UPON THE BASIS OF HER SEX CONSTITUTES A DENIAL OF EQUAL PROTECTION UNDER THE LAW

In the present case, there was no showing whatsoever that the Respondent was a better parent than the Petitioner or that she was any more capable of taking care of the child. On the contrary, there was expert testimony that the Petitioner was a fit parent and that the Respondent had a history of physical abuse and voluntarily attended Parents' Anonymous. The trial judge repeatedly stated that he wanted to grant joint

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custody. Therefore, the award of sole custody herein was based solely upon the traditional role of the female parent to be the child's caretaker.

Last term, this Court held that race could not be taken into consideration in determining child custody. See Palmore v. Sidoti, __U.S.__, 104 St. Ct. 1879 (1984). Further, preferences given to one sex or the other when both parties have the same qualifications is a denial of Equal Protection. See Reed v.Reed, 404 U.S. 71 (1971).

Statutes neutral on their face may be applied so arbitrarily and discriminately so as to constitute a denial of Equal Protection. See Yickwo v Hopkins, 118 U.S. 356 (1886).

The decision to award custody to the female parent is based solely upon tradition and constitutes a denial of Equal Protection. See Mississippi University for Woman v. Hogan,

458 U.S. 718, 724-725, (1982). This court held in Stanton v. Stanton, 421 U.S. 7 (1975) that such considerations could not support a gender-based classification in child support liability, and such considerations cannot support gender-based classifications in child custody awards.

Based upon the substantial majority of child custody awards being granted to the female parent by the state court, Ohio Revised Code Section, 3109.04, the Ohio Child Custody Statute, is being unconstitutionally applied herein.

III. THE USE OF THE BEST INTERESTS OF THE CHILD STANDARD IN A CHILD CUSTODY PROCEEDING WHERE BOTH PARTIES HAVE PARTICIPATED IN THE REARING OF THE CHILD CONSTITUTES A DENIAL OF DUE PROCESS

In Quilloin v. Walcott, 434 U.S. 246 (1978), this Court approved the best interest of the child standard in an adoption proceeding where the natural father had never participated in the rearing of the child.

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As this Court stated:

> ...But this is not a case [where] the unwed father had, or sought [custody, or where] the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence a result desired by all concerned, except appellant. [Under these circumstances it suffices that the State found] that the adoption, and denial of legitimation, was in the 'best interests of the child'.

The importance of the participation of the parent in the rearing of the child and the parent's due process rights in the termination of his parental rights was shown by this Court's recent decision in Lehr v. Robertson, __U.S.__, ____, 1035 S. Ct. 2985, 2993 (1983).

The use of the best interest of the child standard provides insufficient guidelines to judges and requires custody decisions to be based upon the judges' personal and societal values and mores. See Bellotti v. Baird, 443 U.S. 622, 655-656, (1979) (Stevens, J., concurring)

The use of the highly subjective best interest of the child standard in the trial judge's determination of custody denied the Petitioner due process since he had participated in the rearing of the child.

Ohio Revised Code Section 3109.04 is unconstitutional on its face because it requires a court to consider the best interests of the child in determining sole custody of a child in a divorce proceeding where both parents have participated in the rearing of the child.

IV. THE RIGHT TO PARENTAL AUTONOMY DOES NOT HAVE ITS SOURCE IN LAW BUT IN THIS COUNTRY'S INTRINSIC HUMAN RIGHTS AND THE SOLE METHOD OF PROTECTING SUCH RIGHTS FOLLOWING A DIVORCE IS THE EQUALIZATION OF PARENTAL RIGHTS

Unlike property interests that are protected by the Fourteenth Amendment, the liberty interest in family provacy has its source not in State law but in intrinsic human rights as they have been understood in

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"this Nation's history and tradition". See Smith v. Organization of Foster Families for Equality and Reform supra, 845; quoting from Moore v. city of east Cleveland, 431 U.S. at 503. Not only are blood relationships involved in a family unit, but also "the emotional attachments that derive from the intimacy of daily association". See Smith v. Organization of Foster Families for Equality and Reform, supra, 845. The present case does not deal with a situation where the child remains with a recognized family unit. Cf. Quilloin v.Walcott, supra, 255. Rather, the present case deals with the deprivation of a meaningful parent-child relationship based merely on the refusal of one parent to consent to joint custody.

We deal herein with an epidemic that now affects the mental, financial, emotional and social health of over two million more Americans each each year, or almost six

thousand persons each day. If this epidemic were medical, national organizations would be created and funded overnight. Yet, we fail to adequately recognize and treat this problem, which perpetuates and grows larger.

In concert appeared an extensive divorce establishment, made up of highly paid lawyers, conciliators, evaluators, expert witnesses, investigators, referees and judges. It is hardly likely this vast and self-interested group will voluntarily disband. The system is out of control.

The damages are staggering. Over one million new children annually experience divorce and the enforced trauma of separation from one parent, usually the male. This has led to a virtual nation of single, female heads of households, who are overburdened financially and thus lack time and energy to fully and adequately parent their children. Across town are an equal number of disposed male parents who are financially better off,

but who are legally not allowed the time to parent. The social cost in terms of unpaid or misused support, "child-napping" (or child-retrieval in the terms of mens support groups), alcoholism, absenteeism, abandonment, child abuse and neglect, and welfare, are substantial and uncontroverted.

To date, our state governments have floundered in their attempts to address this massive problem, so much so that our federal Congress has been forced to enact laws regarding child-napping and payment of state-ordered support.

Yet, these worthy efforts treat only these most visible symptoms, and not the cause of this epidemic. The cause is not the divorce of the parents. Rather, it is the forcible divorce and destruction of the fundamental relationship of the children and one parent, usually the male, and usually against the basic and fundamental needs and expressed desires of either the children or

the dispossessed parent, now a "visitor" of limited role and impact. Is it any surprise this parent, finding himself legally removed from a full and active role, for no discernable or rational cause, uses the only tools at hand to express his or her outrage and resentment, i.e., to resist, and refuse support and withdraw, or more dramatically, to reinstitute his fundamental right by "child-napping" as an act of last resort.

Studies of joint custody, however, have agreed that the continued parenting, even when ordered against the wishes of either parent, has led to measurably and predictably improved mental health for all, payment of support, few, if any, acts of "child-napping" and most importantly, statistically <u>healthier children</u>. Adaptation to divorce through joint custody awards has proven far less stressful and mercifully short-term in nature. Further, frequent return to the courts, common to sole custody,

is significantly reduced or absent.

In the instant case, the trial judge repeatedly recognized the wisdom of a joint custody award and expressed his desire to so order, and to equalize the parent's roles, but felt constricted by State law from doing so.

This Court can free his hands.

CONCLUSION

A child is entitled to a mother and a father, not a mother and a visitor. The rights of divorced parents to the custody of their children is certainly more important than the right of a male nursing student to enroll in an all female university, which was the situation in Mississippi University for Women v. Hogan, supra.

Parents who have participated in the rearing of a child, and who have developed a parent child relationship, have a fundamental constitutional right to custody of the child following a divorce. Therefore, joint custody

must be awarded to divorced parents unless the state can show harm to the child as a result thereof. Judges must not be unconstitutionally constricted by State law from making this award.

One of the most serious problems in this country today is the enforcement of child support orders as well as parental child-napping. Ensuring that divorced male parents retain their fundamental right to parent will go a long way to solve such problems, as confirmed by current research.

In denying the Petitioners federal constitutional claims, the State Court of Appeals decided an important question of federal law which should be settled by this Court, and a writ of certiori should issue to review the judgment and opinion of the State Court.

Respectfully submitted,

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Petitioner believes that 28 United States Code Section 2403(b) may be applicable, and, has, accordingly served three (3) copies of this Petition upon the Attorney General of the State of Ohio by regular mail. A separate proof of service is filed herewith.

APPENDIX

ORDER OF OHIO SUPREME COURT OF OHIO

The Supreme Court of Ohio

Columbus

1984 TERM

To wit: September 12, 1984

Constance Pournaras, Appellee,	:	
	:	Case No. 84-142
v.	:	MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS
James Pournaras, Appellant.	:	for Cuyahoga County
	:	to CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by James Pournaras.

FOR YOUR INFORMATION ONLY NOT FOR FILING

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

JOURNAL ENTRY AND OPINION OF THE COURT
OF APPEALS FOR CUYAHOGA COUNTY, OHIO
(Dated November 17, 1983)
No. 46259

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

CONSTANCE POURNARAS,

Plaintiff-Appellee,

vs.

JAMES POURNARAS,

Defendant-Appellant.

Journal Entry and Opinion

DATE OF ANNOUNCEMENT OF DECISION:	November 17, 1983
CHARACTER OF PROCEEDING:	Civil Appeal from Common Pleas Court Case No. D-109538
JUDGMENT:	REVERSE and REMAND
DATE OF JOURNALIZATION:	
APPEARANCES: For Plaintiff-Appellee:	Marshall Wolf, Esq. Schwarzwald,Robiner, Wolf&Rock #616 Bond Court Bldg. 1300 E. 9th Street Cleveland, OH 44114

For Defendant-Appellant: Svetlana Schreiber, Esq.
Goodman & Schlachet
#320, 75 Pub. Square
Cleveland, OH 44113

NAHRA, J.:

This is an appeal from the order of the Common Pleas Court, Domestic Relations Division, awarding child custody and attorneys' fees as alimony to appellee.

Appellant, James Pournaras, and appellee, Constance Pournaras, were married on June 14, 1975. They have on child, Phoebe, who was born on January 5, 1977.

On January 8, 1980, appellee filed for a divorce; on January 23, 1980, appellant counterclaimed for divorce. After extensive litigation,[1] the parties agreed to a divorce on June 15, 1982. The parties stipulated that all other issues, e.g. custody, be tried to the Court.

The custody trial began on June 14, 1982, and lasted fourteen days throughout a one-month period. The court awarded custody, child support, six months of alimony, and attorneys' fees as alimony to appellee. Appellant timely appealed

raising several assignments of error. Two issues of one assignment have merit and will be addressed first.

I.

Appellant's sixth assignment of error is, in part, that:

---

1. Approximately 90 pleadings and other papers were filed, including affidavits of prejudice by appellant against assigned judges.

> VI. THE APPELLANT WAS DENIED DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION: THUS THE COURT CREATED REVERSIBLE ERROR.
>
> A. APPELLANT WAS DENIED DUE PROCESS IN THAT THE TRIAL COURT FAILED TO PROVIDE FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REQUEST OF APPELLANT.
>
> . . . .
>
> E. APPELLANT WAS DENIED DUE PROCESS IN THAT HE WAS DENIED HIS RIGHT TO CLOSING ARGUMENT IN THIS EXTENSIVE AND BEFURCATED [sic] TRIAL.

Issues A and E have merit and require a reversal and remanding.

Issue A. The court entered judgment on October 21, 1982. Appellant filed a request for findings of fact on October 28, 1982. The record is void of any response by the trial court.

The court has a mandatory duty to make findings of fact upon proper and timely request. ohio R. Civ. P. 52. It is prejudicial error for a court to neglect to make such findings upon proper and timely request, "unless a reviewing court can determine, without weighing the evidence, that the appellant has not been prejudiced." St. Paul Fire & Marine Ins. Co. v. Battle (1975), 44 Ohio App. 2d 261 (Syllabus 1).

Appellant's first assignment of error challenges the trial court's judgment in awarding appellee attorneys' fees. Appellant's fourth and fifth assignments challenge the award of custody to appellee. These three assignments require us to real the trial transcript and weigh the evidence. We therefore hold that the trial court's failure to make findings of fact pursuant to Rule 52 is reversible error. See Troicky v

Troicky, No. 44916 (8th Dist. Ct. App. 1983): Crawford Carpet & Tile Co. v. Ozanne Construction Co., No. 43154-55 (8th Dist. Ct. App. 1981)

Issue E. At the end of the trial the court indicated there would be on final hearing on a doctor's report yet to be rendered. Tr. 1780. Appellant argues there was no final hearing, but argues that appellant waived his right to closing argument by not requesting same. No affirmative waiver of closing argument appears in the record.

Without having to reach the issue of whether there is an absolute right to closing arguments in a civil non-jury case,[2] we conclude that on

2. Other jurisdictions are split as to whether the denial of closing arguments in a civil non-jury case constitutes reversible error. Compare Fuhrman v. Fuhrman 254 N.W.2d 97 (N.D. 1977) (absolute right to closing argument) with Corpus Christie v. Krause, 584 S.W.2d 325 (Tex. Civ. App. 1979) (denial of closing argument may be harmless error). For a collection of cases in other jurisdictions, see Annot., 38 A.L.R. 2d 1396 (1954).

Denial of closing argument in a criminal bench or jury trial is reversible error. Herring v. New York, 422 U.S. 853 (1975); Columbus v. Woodrick (1976), 48 Ohio App. 2d 274.

on the facts sub judice appellant should have been permitted a closing summation and that appellant did not silently waive closing argument. The custody trial began on June 14, 1982, and continued for approximately fourteen days throughout a one-month period. Appellant had to present his case to the court in a bifurcated fashion. A number of witnesses and expert witnesses testified for both parties. The record indicates that the trial judge specifically reserved argument on certain issues for closing arguments. The trial transcript is nearly 1,800 pages with an additional two volumes of Exhibits. Based upon these facts, appellant should have been permitted to summarize the evidence in a logical analysis for the court. Accordingly, Issue E of appellant's sixth assignment of error is sustained.

Appellant's remaining assignments of error will be addressed in their proper order.

II.

Appellant's first assignment of error is

that:

I. THE AWARD OF ATTORNEYS FEES IS IMPROPER

A. THE TRIAL COURT ERRED IN AWARDING EXCESSIVE AND UNREASONABLE ATTORNEY'S FEES TO APPELLEE IN THE AMOUNT OF $27,501.52: SUCH AWARD WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND AN ABUSE OF DISCRETION.

B. THE TRIAL COURT ERRED IN ORDERING APPELLANT TO PAY ATTORNEY FEES AS ALIMONY TO HIS WIFE IN THAT THE AWARD IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND AN ABUSE OF DISCRETION.

Since we hold that Issue A of appellant's sixth assignment of error is valid, we cannot properly evaluate this assigned error without the trial court's findings of fact.

Appellant's second assignment of error is that:

II. THE TRIAL COURT ERRED IN REFUSING TO CONSIDER JOINT CUSTODY THEREBY DENYING APPELLANT HIS CONSTITUTIONALLY PROTECTED AND FUNDAMENTAL RIGHT TO PARENTAL AUTONOMY WITHOUT SHOWING AN OVERRIDING AND COMPELLING STATE INTEREST.

A. APPELLANT'S PARENTAL RIGHTS ARE FUNDAMENTAL RIGHTS.

B. THIS FUNDAMENTAL RIGHT EXISTS IN THE PARENT INDEPENDENTLY OF THE TRADITIONAL FAMILY UNIT (MARRIAGE).

C. JOINT CUSTODY AS A FUNDAMENTAL RIGHT.

Section 3109.04, which governs custody, provides, in relevant part, that:

> The court may grant the care, custody and control of the children to either parent or, if a request is made in accordance with division (D) of this section, to the parents jointly. The court shall take into account that which would be in the best interest of the children. ... The court shall not grant joint care, custody, and control of the children to the parents unless they request the grant of joint care, custody, and control pursuant to division (D) of this section.

Ohio Rev. Code Ann. Sec. 3109.04(A) (Page Supp. 1982)[3]. Accordingly, a two step process must occur before a court may award joint custody: (1) both parents must properly request joint custody; and (2) the court must determine that joint custody is in the best interet of the children. Appellant argues first that requiring both parents to request joint custody before the court may even consider an award of joint custody amounts to an unconstitutional procedural impediment to the exercise of his fundamental right to parent. Secondly, appellant argues that the "best interest of the child" standard is unconstitutional since the sole compelling interest for which a state may override parental rights is the state's interest in protecting a child from harm. We disagree with appellant's contentions and hold Sec. 3109.04(A) constitutional.

We do agree with appellant that the relationship between a parent and a child is a fundamental right protected by the United States Constituion. Quilloin v. Walcott, 434 U.S. 246,

reh'g denied, 435 U.S. 918)1978). We disagree, however, that joint custody is necessarily a

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3. Division (D) of Sec. 3109.04 outlines the necessary content of the parents' request for joint custody.

fundamental right. At the time of a divorce, both parents have an equal right to custody. The court has the authority to award custody to one parent instead of the other parent if it is in the best interest of the child to do so. Ohio Rev. Code Ann. Sec. 3109.04(A) (Page Supp. 1982). Courts have traditionally had this authority, and appellant does not challenge this authority.

Joint custody is a liberalization of the former traditional award of custody to only one parent. Appellant does not challenge the legislature's granting of authority to the courts to now consider a joint custody award. Appellant does challenge the condition precedent to such a consideration by the court, i.e., that both parents request joint custody.

We cannot say that the legislature acted

unreasonably or irrationally in requiring a mutual request for joint custody. Without the parents' initial agreement to joint custody, the ability of the parents to cooperate in reaching shared decisions in matters affecting the child's welfare is greatly reduced. A child could be detrimentally exposed to conflicting parental demands regarding major decisions affecting the child. Dsputes about care could result in frequent resort to the courts generating insecurity in a child. It would be grossly inappropriate to compel joint custody without the desire or consent of both parents. Such a declaration could only result in family chaos. See Braiman v.Braiman, 44 N.Y. 2d 584, 378 N.E. 2d 1019 (1978). The restriction upon an award of joint custody in Sec. 1309.04(A) is reasonable, and in other jurisdictions a most important factor in favor of a joint custody award, see Annot., 17 A.L.R. 4th 1013 (1982), and is therefore constitutional.

IV.

BEST AVA

Appellant's third assignment of error is that:

III. THE TRIAL COURT, BEING A COURT OF EQUITY, ERRED IN ITS SELF APPRAISAL THAT IT LACKED THE POWER TO FASHION A REMEDY IN JOINT CUSTODY.

A. EQUITY AND JOINT CUSTODY AS DEFINED IN O.R.C. 3109.04 ARE NOT MUTUALLY EXCLUSIVE OR INCONSISTENT.

B. O.R.C. 3109.04, AS WRITTEN, ALLOWS THE COURT IN AND OF ITSELF, TO AWARD JOINT CUSTODY.

C. FAILURE TO PERMIT JOINT CUSTODY WHERE PARTIES ARE NOT IN AGREEMENT ALLOWS A WRONG TO EXIST WITHOUT A REMEDY.

Based upon our disposition of appellant's second assignment of error, we conclude that the trial court did not err in adhering to the

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statute. In fact, it would have been error for the court to compel joint custody when both parents did not request it.

V.

Appellant's fourth assignment of error is that:

> IV. THE TRIAL COURT ERRED IN AWARDING SOLE CUSTODY TO THE APPELLEE; ITS FINDING THAT SAID AWARD WAS IN THE BEST INTEREST OF THE CHILD WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Since we hold that Issue A of appellant's sixth assignment of error is valid, we cannot properly evaluate this assigned error without the trial court's findings of fact.

VI.

Appellant's fifth assignment of error is that:

> V. THE AWARD OF SOLE CUSTODY TO THE APPELLEE WAS DISCRIMINATORY AND IN VIOLATION OF EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION.

Since we hold that Issue A of appellant's sixth assignment of error is valid, we cannot properly address this assigned error without the findings of the trial court.

VII.

Appellant's sixth assignment of eror, and the remaining issues to be address thereunder is that:

> VI. THE APPELLANT WAS DENIED DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION: THUS THE COURT CREATED REVERSIBLE ERROR.
>
> . . . .
>
> B. APPELLANT WAS DENIED DUE PROCESS IN THAT THE TRIAL COURT IMPROPERLY GRANTED APPELLEE A "PROTECTIVE ORDER" DENYING THE APPELLANT ADEQUATE DISCOVERY.
>
> C. APPELLANT WAS DENIED DUE PROCESS IN THAT THE TRIAL COURT REFUSED TO ENFORCE ORDERS COMPELLING DISCOVERY THEREBY DENYING APPELLANT PRE-TRIAL OPPORTUNITY TO PREPARE HIS CASE.
>
> D. APPELLANT WAS DENIED DUE PROCESS IN THAT HIS CASE WAS IMPROPERLY ASSIGNED TO A VISITING JUDGE, AND THUS THE COURT PROCEEDED WITHOUT JURISDICTION.

Issue B. Appellant contends he was denied due process when the trial court granted appellee's motion for a protective order. The journal entry of April 26, 1982, granting the protective order indicates that a hearing was held on the motion. However, no transcript or statement of the evidence appears in the record.

Since rulings regarding the discovery provisions of the civil rules are within the trial court's discretion, without a record of the hearing, we must presume its regularity. Ostrander v. Parker-Fallis (1972), 29 Ohio St. 2d 72; Mancino v. Friedman (1980), 69 Ohio App. 2d 30; Bates & Springer, Inc. v. Stallworth (1978), 56 Ohio App. 2d 223. Therefore, we cannot say that the trial court's conclusion was in error resulting in a denial of appellant's due process rights.

Issue C. Appellant has alleged, but failed to show prejudice in this regard and this assignment is therefore overruled.

Issue D. After Judge Roman stepped aside, the administrative judg ordered "(t)his cause to be assigned to a visiting judge for trial." Journal Entry, No. 824, P. 304, Jan. 29, 1982. Visiting Judge Fred V. Skok was assigned to appellant's case. On March 3, 1982, appellant filed an Affidavit of Prejudice and Disqualification against Judge Skok alleging,

inter alia, that the visiting judge was improperly assigned. On March 8, 1982, Chief Justice Frank D. Celebrezze wrote appellant stating that the allegations challenging the visiting judge were insufficient to support a finding of prejudice. Chief Justice Celebrezze ordered appellant to submit evidence within ten day to him and to Judge Skok. The record does not contain any response by appellant to Chief Justice Celebrezze's order.

Second 2701.03 governs the disqualification of judges and provides, in part, that:

> When a judge of the court of common pleas is interested in a cause or matter pending before the court, is related to, or has a bias or prejudice either for or against, a party to a matter or cause pending before the court of his counsel, or is otherwise disqualified to sit in a cause or matter pending before the court, on the filing of an affidavit by any party to the cause or matter, or by the counsel of any

> party, setting forth the fact of the interest, bias, prejudice, or disqualification, the clerk of the court of common pleas shall enter the fact of the filing on the trial docket in the cause and forthwith notify the chief justice of the forthwith notify the chief justice of the supreme court. The chief justice, or any judge of the supreme court designated by him, shall pass upon the disqualification of the judge pursuant to Section 5(C) of Article IV, Ohio Constitution.

Ohio Rev. Code Ann. Sec. 2701.03 (Page 1981). Thus, authority to pass upon the disqualification of a judge is vested in the Chief Justice or his designee. Since only the Chief Justice of his designee may hear disqualification matters, we are without authority to pass upon disqualification or to void the judgment of the trial court on that basis. Beer v. Griffith (1978), 54 Ohio St. 2d 440; City of Kettering v. Berger (1982), 4 Ohio App. 3d 254. Therefore, Issue D, of appellant's sixth assignment of error is overruled.

We reverse and remand to the Common Pleas Court for Judge Skok to hear closing arguments, enter judgment and, assuming a request for findings of fact and conclusions of law is again made, to appropriately respond to such request.

JUDGMENT ENTRY OF COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS, CUYAHOGA COUNTY
OHIO

No. 80-D-109438

(Dated october 21, 1982)

IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
CUYAHOGA COUNTY, OHIO

CONSTANCE POURNARAS,

Plaintiff,

vs.

JAMES POURNARAS

Defendant.

This matter came before the Court upon the plaintiff's Complaint for Divorce and the

defendant's Answer and Counterclaim, with both litigants duly served with process personally according to law.

The cause came on for hearing on JUne 14, 1982 and thereafter before the Honorable Fred V. Skok with both parties present and represented by counsel.

Upon the evidence and due consideration thereof, the Court finds that the plaintiff, CONSTANCE POURNARAS, was a bonafide resident of the State of Ohio for more than one year and a bonafide resident of the County of Cuyahoga for more than ninety days, both immediately preceding the filing of the Complaint; that the parties were married at Chagrin Falls, Ohio, on June 13, 1975; and that one child was born as issue of said marriage, to-wit: PHOEBE, born January 6, 1977.

The Court further finds that the parties were divorce and the marriage contract dissolved and set aside pursuant to an agreed Judgment Entry signed by counsel and the Court and journalized during the trial of this matter, and that said

Judgment Entry, filed June 15, 1982 was docketed in Divorce Journal Volume 848 on pages 126 and 127, finds that the parties have lived separate and apart without cohabitation for a period in excess of two years and that by reason thereof, the parties are entitled to a divorce as prayed for in the plaintiff's Amended Complaint and the defendant's Counterclaim.

WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the prior Judgment Entry of this Court granting the parties herein a Decree of Divorce and dissolving and setting aside their marriage contract be and hereby is incorporated and ratified herein.

IT IS FURTHER ORDERED that the sole and and exclusive care, custody and control of the minor child of the parties, namely: PHOEBE, be and hereby is awarded to the plaintiff until further order of the Court.

IT IS FURTHER ORDERED that the defendant shall pay, through the Office of the Clerk of Courts, Forty ($40.00) dollars each week, plus two

percent (2%) poundage, for the support of the minor child, namely: PHOEBE, plus necessary medical and dental expenses, until the child reaches the age of majority or further order of the Court.

IT IS FURTHER ORDERED that the defendant shall visit with the minor child away from the plaintiff's home, during the school term, every other weekend from the close of school on Friday until one-half hour before the child's bedtime Sunday night.

IT IS FURTHER ORDERED that the defendant shall visit with the minor child away from the plaintiff's home, during the school term, one weekday night each week from the close of school until one-half hour before the child's bedtime; said not shall be by agreement of the parties, and if the parties cannot agree to a night, then Wednesday night shall be the time for visitation.

IT IS FURTHER ORDERED that the defendant shall have access to and participation in all school functions, activities and procedures, including but not limited to, conference with administrators, teachers, school psychologists, and health personnel.

IT IS FURTHER ORDERED that the defendant shall visit with the minor child away from the plaintiff's home, during the child's summary vacation, in accordance with the visitation schedule established in regard to the school year; however, in lieu of visitation beginning at the close of the school day, visitation shall begin at five o'clock for both the weekday and alternating weekend visitation times.

IT IS FURTHER ORDERED that the defendant shall visit with the minor child away from the plaintiff's home, during the child's summer vacation of 1983, for two separate periods of two weeks each for a total of four weeks visitation; this is in addition to the regular visitation schedule previously set out.

IT IS FURTHER ORDERED that the parties alternate yearly on national holiday visitation privileges with the minor child. If the plaintiff has the minor child on Christmas or Easter or Independence Day in 1983, the defendant shall have the minor child on Christmas or Easter or Independence Day in 1984. An exception to this order is noted for Mother's Day, wherein the plaintiff shall always have the minor child; and Father's Day, wherein the defendant shall always have the minor child. All other important holidays, like the child's birthday, shall be handled in an equitable manner.

IT IS FURTHER ORDERED that the defendant shall pay, through the Office of the Clerk of Courts, Thirty Dollars ($30.00) each week, plus two percent (2%) poundage, for alimony to the plaintiff. Said alimony payments shall begin forthwith and shall cease six (6) months from the date of defendant's first payment.

IT IS FURTHER ORDERED that all marital assets be divided equally between the parties; this

includes the Two Thousand Two Hundred Eighty-three Dollars and Forty-six Cents ($2,283.46) held in escrow from the sale of the marital residence.

IT IS FURTHER ORDERED that the defendant pay to the plaintiff as alimony, toward her counsel fees to Paula Hopkins, the sum of Twenty-three Thousand Eight Hundred Dollars ($23,800.00) and Marshall J. Wolf, the sum of Two Thousand Dollars ($2,000.00) and to counsel for out of pocket expenses the sum of One Thousand Seven Hundred

One Dollars and fifty-two Cents ($1,701.52), for which judgment is rendered and execution may issue.

IT IS FURTHER ORDERED that the parties may agree to amend this judgment and that if diagreement or lack of understanding exists as to the judgment, the Court shall hear a motion for clarification.

IT IS FURTHER ORDERED that the goal of the Court is to divide the child's time between the parents as equally as possible and that the defendant's visitation rights to the child are to escalate as the child grows older; specifically, the defendant's summer visitation privilege of four (4) weeks during the summer of 1983 is to expand thereafter in a manner to be determined by the parties through agreement or by the Court if no agreement can be reached.

Costs of this action are taxed to plaintiff.

AMENDMENT XIV [1868]

TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE SECTION 3109.04

(A) Upon hearing the testimony of either or both parents and in accordance with sections 3109.21 to 3109.36 of the Revised Code, the court shall decide to whom the care, custody and control of the children shall be given. The court may grant the care, custody, and control of the children to either parent or, if a request is made in accordance with division (D) of this section,

to the parents jointly. The court shall take into account that which would be in the best interest of the children. The court may allow any child who is twelve years of age or older to choose, in an original proceeding on custody and in a proceeding for modification of a prior custody order of the court, the parent with whom the child is to live, unless the court finds that the parent so selected is unfit to take charge or unless the court finds, with respect to a child who is twelve years of age or older, that it would not be in the best interest of the child to have the choice. The court shall not grant joint care, custody and control of the children to the parents unless they request the grant of joint care, custody and control pursuant to division (D) of this section.

If the court allows any child who is twelve years of age or older to choose the parent with whom the child is to live, the court shall offer the child the opportunity to inform the court of the choice in chambers or in open court. If the child elects to inform the court of the choice in

chambers, no persons other than the child, the child's attorney, the judge, any necessary court personnel, and, in the judge's discretion, the attorney of each parent shall be permitted to be present in the chambers when the child informs the court of the choice and is questioned with respect to the choice.

Prior to trial, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of the parties to the action and may order the parties and their minor children to submit to medical, psychological, and psychiatric examinations. The report of the investigation and examinations shall be made available to either party of his counsel of record not less than five days before trial, upon written request. The report shall be signed by the investigator and the investigator shall be subject to cross-examination by either party concerning the contents of the report. the court may tax as costs all or any part of the expenses for each

investigation.

The court may order that the parents have joint care, custody and control of the children only if both parents request joint custody and file a plan for joint custody pursuant to dividion (D) of this section and if joint custody is in the best interest of the children. Upon the filing of a plan requesting the joint care, custody, and control of the children, the court shall review the parents' plan for joint custody to determine if the plan is in the best interest of the children. if the court determines that the plan is in the best interest of the children, the court shall approve the plan. If the court determines that the plan or any part of the plan is not in the best interest of the children, the court shall require the parents to make appropriate changes to the plan to meet the court's objections to the plan. If changes to the plan are made to meet the court's objections, and if the new plan is in the best interest of the children, the court shall approve the plan. If changes to the plan are not

made to meet the court's objections, or if the parents attempt to make changes to the plan to meet the court's objections, but the court determines that the new plan or any part of the new plan still is not in the best interest of the children, the court may reject the parents' request for joint care, custody, and control of the children and proceed as if the request had not ben made. A plan approved by the court under this division shall be incorporated into a provisional joint custody decree granting the parents the provisional joint care, custody, and control of the children. The provisional joint custody decree shall clearly state that it is provisional, that it may be modified at any time prior to sixty days after the date of its issuance, and that it is subject to termination at any time prior to ninety days after the date of its issuance, and that is is subject to termination at any time prior to ninety days after the date of its issuance upon motion of either parent or, in certain situations, upon motion of the court

itself, that if either parent or the court itself makes such a motion, the court is required to terminate the provisional joint custody decree and proceed as if no request for joint custody ever had been made, and that if neither parent nor the court itself makes such a motion prior to the expiration of the ninety-day [sic] period, the provisional joint custody decree immediately and without need for further action becomes final on the ninetieth day after the date of its issuance, subject to modification or termination authorized by this section. Any such provisional joint custody decree shall be appended to, but shall be separate and independent from and shall not affect the final decree of dissolution, divorce, separation, annulment, or alimony arising out of the action out of which the question of care, custody, and control arose.

If the court finds, with respect to any child under eighteen years of age, that custody to neither parent is in the best interest of the child, it may commit the child to a relative of

the child or certify a copy of its findings, together with as much of the record and the further information, in narrative form or otherwise, as it deems necessary or that the juvenile court requests, to the juvenile court for further proceedings, and, upon the certification, the juvenile court has exclusive jurisdiction.

(C) In determining the best interest of a child purusant to this section, whether on an original award of custody or modification of custody, the court shall consider all relevant factors, including:

(1) the wishes of the child's parents regarding his custody;

(2) The wishes of the child regarding his custody if he is eleven years of age or older;

(3) The child's interaction and interrelationship with his parents, siblings, and any other person who may significantly affect the child's best interest;

(4) The child's adjustment to his home, school, and community;

(5) The mental and physical health of all persons involved in the situation.

(D) the parents of any children may request the court to grant them joint care, custody, and control of the children in a proceeding held pursuant to division (A) of this section. If a request for joint care, custody, and control is made, the parents making the request shall file with the court a plan for their exercise of joint care, custody, and control of the children. The plan shall be filed with the petition for dissolution of marriage, if the questionof care, custody, and control arises out of an action for dissolution of marriage, or, in other cases, at a time at least thirty days prior to the hearing of the issue of the care, custody, and control of the children. A plan for joint custody shall include provisions covering all factors that are relevant to the care, custody, and control of the children, including, but not limited to provisions convering factors such a physical living arrangements, child support obligations, provision for the children's

medical and dental care, school placement, and visitation.

(E) "Joint custody" or "joint care, custody and control," as used in the Revised Code, means that the parents share, in the manner set forth in the parents' plan for joing custody that is approved by the court, all or some of the aspects of physical and legal care, custody, and control of their children.

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Joint Custody As A Fundamental Right

Ellen Canacakos

In the introduction to *The Disposable Parent*,[1] William Haddad, one of the book's co-authors, relates his encounter with the court's process of determining custody following his divorce. Haddad proposed to the judge a joint custody arrangement whereby he would share custody of his three daughters equally with his ex-wife; he offered to submit the matter to a panel of psychiatrists in order to determine his fitness as a parent and the impact of the proposed arrangement on the children.[2]

When the hearing was over, the judge awarded Haddad's ex-wife sole custody.[3] Haddad was allowed to see the children on Thursdays after school until 8:00 p.m. and on alternate weekends.[4] He was not allowed to see them at any other times, except to drive them to school in the mornings.[5] He was not allowed to be with them the two or three nights of each week his wife was not at home. When she had to be out of town for a week or longer, the children were not to be allowed to stay with their father but were instead sent to stay with relatives or friends.[6]

The judge refused the joint custody arrangement despite the facts that Haddad's fitness as a parent had not been challenged, he lived only a few blocks away from his ex-wife, and the children would always attend the same school and never be far away from their friends.[7] From talking to his daughters, Haddad learned that the judge had talked to them in chambers and that each had told the judge of a desire to try the joint custody arrangement.[8] According to the children, the judge instructed them not to tell either parent what the judge had said or what

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1. M. Roman & W. Haddad, The Disposable Parent: The Case for Joint Custody (1978).
2. *Id.* at 8.
3. *Id.* at 2.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 9.
8. *Id.* at 12.

preferences the children had expressed concerning custody.[9]

Given the factual situation, the outcome of this case seems unfair and possibly atypical. But in fact, at operation in this case is the common presumption in favor of maternal custody.[10] The assumptions underlying such a presumption have been the object of frequent criticism by both courts[11] and commentators.[12] What is often not noticed, however, is that the presumption of maternal custody rests upon an even more important and general presumption—namely, the presumption of sole custody. The presumption is that one parent alone, rather than both parents together, should have custody of the children following a divorce.[13]

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9. *Id.* at 13.

10. *See* Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 463 (1976-77); Watson, *The Children of Armageddon: The Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 82 (1969); Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U. CAL. D. L. REV. 471, 479 (1979).

Up until the nineteenth century, English common law gave the father absolute custodial rights over the children as against the mother. P. WOOLLEY, THE CUSTODY HANDBOOK 257 (1979). The Chancery, acting on behalf of the king's parens patriae authority, interfered with the father's custody only in cases of gross parental abuse. *Id.*

During the late nineteenth and early twentieth centuries, many social changes began to impinge upon the father's superior right to custody. The Industrial Revolution began to change the country from a primarily agricultural, rural society to an industralized, urban one. Significant numbers of women joined the labor force, some owned property, and, in 1919, the nineteenth amendment was passed giving women the right to vote. It was during this period that psychologists, educators and philosophers became enamored with the developmental state known as "childhood". *See id.* at 256. Public education improved and child labor laws became more stringent. *Id.* Upon the popularization of Freud's theories, men, as well as society in general, embraced the idea that the mother-child relationship is a key to the emotional and psychological well-being of the child. *Id.* Thus, mothers should be at home with, and in the event of divorce, have custody of, their young children. *See* Ward v. Ward, 88 Ariz. 130, 137, 353 P.2d 895, 900 (1960); Harmon v. Harmon, 264 Ky. 315, 317, 94 S.W.2d 670, 673 (1936). This conviction that mothers were naturally the better and more nurturing figure in the child's development became the rationale for what was to be called the "tender years" presumption. P. WOOLLEY, *supra* at 258.

In 1925, the "best interest of the child" standard began to replace the tender years doctrine. *See* Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925). In practice, however, courts often held that it was in the child's best interest not to be separated from the mother unless the mother was shown to be unfit. *See* Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminancy*, 39 LAW & CONTEMP. PROB. 226, 235 (Summer 1975). Thus, psychological principles concerning the importance of a loving, consistent mother figure in the child's development became the basis of a presumption in favor of maternal custody. *See, e.g.*, Washburn v. Washburn, 49 Cal. App. 2d 581, 588, 122 P.2d 96, 100 (1942); Tuter v. Tuter, 120 S.W.2d 203, 205 (Mo. 1938); Jenkins v. Jenkins, 173 Wis. 592, 595, 181 N.W. 826, 827 (1921).

11. *See, e.g.*, State *ex rel* Stanfield v. Stanfield, 435 S.W.2d 690, 692 (Mo. 1968); Watts v. Watts, 77 Misc. 2d 178, 181, 350 N.Y.S.2d 285, 288-89 (1973); Hamachek v. Hamachek, 270 Wis. 194, 201, 70 N.W.2d 595, 599 (1955). *See also* Freed & Foster, *Divorce in the Fifty States: An Overview as of 1978*, 13 FAM. L.Q. 105, 123 (1979) (authors compile a comprehensive list of those states that have rejected the tender years doctrine by court decision).

12. *See* M. ROMAN & W. HADDAD, *supra* note 1, at 40-47; Mnookin, *supra* note 10, at 235-36; Nash, *The Father in Contemporary Culture and Current Psychological Literature*, 36 CHILD DEV. 261, 271-74 (1965); Podell, Peck, & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51, 53 (1972); Roth, *supra* note 10, at 442-43; Comment, *Examining Oklahoma's Maternal Preference Doctine: Gordon v. Gordon*, 13 TULSA L.J. 802, 805-07 (1978).

13. *See* Marriage of Pergament, 28 Or. App. 459, 462, 559 P.2d 942, 943 (1977) ("When a family is split by dissolution of the marriage the child of necessity can be in custody of only one parent and the custodial parent is given the primary responsibility for rearing the child.").

Thus, when a father stresses his "equal" right to the custody of his children, it is often with the purpose of demonstrating that he, instead of the mother, should be the object of a sole custody award.[14] Yet, if the positions of the two parents are indeed equal, then neither parent alone should be presumed to have a right to sole custody. The equality of each parent's right to custody should be reflected in a presumption of joint custody—a presumption to be rebutted only by such factors as harm to the child.[15] Joint custody, unlike sole custody,[16] preserves equality in that both parents retain legal responsibility and authority for the care and control of the child.[17]

In what follows, it shall be argued that what seems intuitively fair—that the recognition of equal parental rights be reflected in a presumption of joint custody[18]—is constitutionally mandated. More spe-

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14. *See* Kapner & Frumkes, *The Trial of a Custody Conflict*, 52 FLA. B.J., 174, 175 (1978); Solomon, *The Fathers' Revolution in Custody Cases*, TRIAL, Oct. 1977, at 33-35. *See generally*, Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1224-26 (1974).

15. The requirement of proving "harm" to the child is a standard often employed in proceedings where the state seeks to terminate the rights of an allegedly unfit parent. *See, e.g.*, Roe v. Conn, 417 F. Supp. 769, 776-79 (M. D. Ala. 1976); Alsager v. District Court, 406 F. Supp. 10, 23, 24 (S.D. Iowa 1975) *aff'd*, 545 F.2d 1137 (8th Cir. 1976). The harm standard differs from the "best interest of the child" standard in that the former applies only to custody proceedings where the state is the party seeking to assume custody while the latter is appropriate in proceedings where the parties have an equal right to custody, such as pursuant to a divorce. 417 F. Supp at 779 n.12. *See also* text & notes 91-96 *infra*.

16. Sole custody awards vest ultimate control and legal responsibility for the child in the parent awarded such custody. In most cases, the other parent has regular visitation. *See* S. RAMOS, THE COMPLETE BOOK OF CHILD CUSTODY 49, 64 (1979); Miller, *Joint Custody*, 13 FAM. L.Q. 345, 354-57 (1979); Mnookin, *supra* note 10, at 233.

17. Odette R. v. Douglas R., 91 Misc. 2d 792, 795, 399 N.Y.S.2d 93, 96 (Fam Ct. 1977); *see* Cox & Cease, *Joint Custody*, 1 FAMILY ADVOCATE, Summer, 1978, at 10; Foster & Freed, *Joint Custody—A Viable Alternative*?, TRIAL, May, 1979, at 26.

18. Joint custody encompasses both joint "legal" custody and joint "physical" custody. *See* Miller, *supra* note 16, at 360. Legal custody secures the right of a parent to participate in making child-rearing decisions, such as decisions about the child's education, health care and religious training. Comment, *Joint Custody: An Alternative For Divorced Parents*, 26 U.C.L.A. L. REV. 1084, 1087 (1979). Joint physical custody, on the other hand, involves the sharing of physical custody by both parents on an equal or split-time basis. Miller, *supra* note 16, at 360. Courts and commentators are unable to agree on exactly what mix of legal and physical custody constitutes the joint custody arrangement. For instance, the court in Dodd v. Dodd, 93 Misc. 2d 641, 403 N.Y.S.2d 401, (Sup. Ct. 1978) remarked:

> Joint custody has been defined as giving both parents 'legal responsibility for the child's care and alternating companionship'. An examination of the joint custody cases in New York reveals that there has been no uniform application of the term 'joint custody' and no single arrangement which results when a joint award is made. Joint or divided custody decrees generally give both parents legal responsibility for the child's care, but when physical or actual custody is lodged primarily in one parent, custody may be 'joint' in name only.

Id. at 644-45, 403 N.Y.S.2d at 403 (citations omitted). Roman & Haddad, characterized joint custody as "that post divorce custodial arrangement in which parents agree to equally share the authority for making all decisions that significantly affect the lives of their children." M. ROMAN & W. HADDAD, *supra* note 1, at 175.

> Joint custody has been negatively defined as not meaning that one person is to have a child for six months and the other for another six months, though it can mean a sharing of the living arrangements. Joint custody is more than an arrangement wherein one child resides with two parents—it is a flexible and open arrangement for living, sharing, and loving.

cifically, this Note will argue that a presumption of joint custody proceeds logically from each parent's fundamental right of parental autonomy.

A. *The Impact of Divorce on Parental Rights*

The Supreme Court has acknowledged that the relationship between parent and child and other relationships within the family enclave are constitutionally protected from state intrusion.[19] As long as the family unit remains intact, the Constitution recognizes and protects against state interference the rights of both the mother and the father to the custody and control of their children.[20] When divorce occurs, however, the constitutional protection normally afforded the rights of parents gives way to the legal standard normally referred to as the "best interest of the child."[21] This standard embodies the state's paramount concern for the welfare of the child.[22] Thus, upon divorce, the right of

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Grote & Weinstein, *supra* note 16, at 45.

Persia Woolley describes joint custody as "any method that permits the children to grow up knowing and interacting with each parent in an everyday situation, whether that comes about by splitting the time on a fifty-fifty basis each week or by having the children go live with the other parent several years or more." Woolley, *Shared Custody*, FAMILY ADVOCATE, Summer, 1978, at 6. Suzanne Ramos maintains that

> [i]n joint custody, separated or divorced parents agree to act as equal partners in raising the children. Both parents share in decisions regarding where the children live, where they go to school, who their friends are and in what activities they are involved. They share in paying the bills equitably as their incomes allow, spend roughly the same amount of time with the children and otherwise participate in all decisions and responsibilities having to do with them.

S. RAMOS, THE COMPLETE BOOK OF CHILD CUSTODY 86 (1979).

Similarly, David Miller describes the essence of joint custody as the sharing, by both parents of responsibility and authority concerning the children. Miller, *supra* note 16, at 360. As Miller describes the arrangement:

> This involves parental consultation and agreement on all major decisions affecting the children. The decision making process thus approximates that of an intact nuclear family. Parents with joint custody make joint decisions on all matters having a significant impact on their children's lives. Such matters include the upbringing, education, religion and financial support of the children. Also included would be medical and psychological help, if necessary, school vacations and trips, summer camp, and extracurricular activities and associations. The specifics of these decisions are left to the parents themselves; in the eyes of the law the parents are on an absolutely equal footing.

Id. (footnotes omitted).

19. Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

20. Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Carey v. Population Serv. Int'l, 431 U.S. 678, 708 (1977) (Powell, J., concurring in part and concurring in the judgment); Ginsberg v. New York, 390 U.S. 629, 639 (1968).

21. The "best interest of the child" test was first articulated by Justice Brewer in *Chapsky v. Wood*, 26 Kan. 650, 652-53 (1881). In that case, the court awarded custody of a 5 year old girl to her grandmother rather than to her father; although the father had a natural right to custody, the paramount consideration was the welfare of the child. *See generally id.*

This legal test has since become the focal point of most state custody statutes. *See, e.g.*, GA. CODE ANN. § 30-127(a) (Supp. 1979); MINN. STAT. ANN. § 518.17 (West Supp. 1978); UTAH CODE ANN. § 30-3-10 (Supp. 1979).

22. *See* Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925). In *Finlay v. Finlay*, Justice Cardozo explained the test as follows:

> The chancellor in exercising his jurisdiction upon petition does not proceed upon the

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parents to the custody and control of their children becomes subject to the court's perceptions[23] of the advancement of the child's welfare.[24]

Before attempting to understand why, in matters involving child custody following a divorce, the rights of parents have been ignored in the name of the best interest of the child, the nature of those parental rights must be fully understood. Of particular importance is whether the constitutional protection afforded the rights of parents is incident to the desire to protect and promote the traditional institution of the nuclear family or whether such protection proceeds from the law's respect for certain relationships that are typically, but not necessarily, contained within the traditional nuclear family. If constitutional protection of parental rights depends upon the continued existence of the nuclear family unit, then dissolution of that unit by divorce would make constitutional protection of those rights inapposite. If, however, the protection afforded the nuclear family unit derives from the individual rights of those within the family, then application of the best interest of the child standard in adjudicating child custody pursuant to a divorce may contravene constitutionally protected parental rights. The following section will demonstrate that such protection derives not from the family unit per se but from the rights of individuals within the family.

B. *Parental Autonomy as a Fundamental Right*

Free societies are concerned with the protection of the autonomy of their citizens.[25] Autonomy, as a philosophical idea, is the right to

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theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against anyone. He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a 'wise affectionate, and careful parent' . . . and make provision for the child accordingly.

Id. (citation omitted).

23. Upon divorce, the courts in all states are automatically vested with the jurisdiction to determine the future care and custody of any minor children. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 17.3, at 576 (1968); A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS §§ 14(3)-14(4) (1978 & Supp. 1979).

24. *See* People v. McCanliss, 255 N.Y. 456, 457, 175 N.E. 129, 130 (1931); Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925).

25. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Brandeis wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Id. See also, J. RAWLS, A THEORY OF JUSTICE, 60 (1971) (According to Rawls, the basic demand of social justice is contained in the following principle: "[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."); Murphy, *Therapy and the Problem of Autonomous Consent*, INT'L J.L. & PSYCH. 415, 415 (1979).

control the important aspects of one's destiny by one's choices; stated differently, it is the right to be free from the intentional interference of others, especially the state, in the making and enacting of such choices.[26]

This section contains an analysis of the constitutional cases addressing the rights of parents in various contexts. In that regard, first it will be shown that these cases establish what will be called a "fundamental right of parental autonomy"—the right to participate in the basic decisions that affect the life, future, and welfare of one's children. It will be argued that each parent enjoys this right equally, independent of the confines of the traditional nuclear family setting. The practical implication of continuing to recognize the fundamental right of each parent following divorce, however, is that unless one parent consents to the other's custody of the child, the parents' respective rights will appear to conflict with one another in a subsequent adjudication of child custody. This conflict may be resolved by a presumption of joint custody—no other presumption being consistent with the equality of the rights established.

Before a discussion of the relevant constitutional cases, however, two points of clarification are in order. First, it is important to remember that in constitutional law, the concept of a fundamental right is defined as the following: a right so basic or essential that the state must have a compelling interest to override it[27] and must, even in those cases, use the least restrictive means possible to secure the compelling interest.[28] Second, it is important to note that fundamental rights belong to individuals, not groups or abstract entities.[29] This concept is particularly important to remember in the present context because in many cases, the Supreme Court speaks somewhat loosely of "family rights" or "family autonomy."[30] On a superficial reading of such terms, one might reasonably assume that what is being protected are

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26. Whalen v. Roe, 429 U.S. 589, 599-600 (1977); Eisenstadt v. Baird, 405 U.S. 438, 453-54, 463-65 (1972).

27. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 162-63 (1973); Dunn v. Blumstein, 405 U.S. 330, 342 (1972); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969).

28. The least restrictive alternative doctrine was defined in *Shelton v. Tucker* as follows:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of the least drastic means for achieving the same basic purpose.

364 U.S. 479, 488 (1960).

29. *See* Roe v. Wade, 410 U.S. 113, 153 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("[I]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

30. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 499-500 (1977); Smith v. Organization of Foster Families for Equality, 431 U.S. 816, 842-44 (1977); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

not individual rights but rather the rights of some social complex—the family. As will be shown, however, even the cases couched in such language are essentially concerned with the protection of individual rights. An individual may acquire a certain right (*e.g.*, a right of parenthood) by virtue of a certain relationship (*e.g.*, biological parenthood). Rights associated with such relationships derive from those relationships in a manner that rights acquired simply by being a citizen (*e.g.*, the right of free speech) do not. It may also be true that such relationships are typically, though not always, present in nuclear families. Courts sometimes speak loosely of simply the "rights of the family" when it is clear that their real concern is to protect certain valued relationships and the individual's right to those relationships. Justice Harlan saw this distinction clearly in *Poe v. Ullman*,[31] when he stated, "[H]ere we have not an intrusion into the home so much as on the life which characteristically has its place in the home. . . ."[32]

The family, then, is protected because the relationships it contains are deemed worth protecting.[33] These relationships are deemed worth protecting because they are presumed to be important to the intergrity and welfare of the individuals who are parties to them.[34] With these thoughts in mind, the relevant constitutional cases will now be explored.

The Supreme Court has long recognized the existence of certain fundamental rights that, although not specifically mentioned in the Bill of Rights, are "basic values 'implicit in the concept of ordered liberty' "[35] and are thus accorded the full protection reserved for enumerated rights.[36] Although the right of parental autonomy is not specifically mentioned in the Constitution, the Supreme Court cases dealing with parental rights suggest that they are so basic that they must be regarded as fundamental.[37]

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31. 367 U.S. 497 (1961).
32. *Id.* at 551-52 (Harlan, J., dissenting).
33. *See* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 860-63 (1977) (Stewart, J., concurring); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977).
34. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972).
35. Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
36. *See* Roe v. Wade, 410 U.S. 113, 152 (1973). The mechanism for identifying rights protected by the due process clause is contained in Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479 (1967) in the following terms:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'. . . ."

Id. at 3 (citations omitted).
37. *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Poe v. Ullman, 367 U.S. 497, 551-

The earliest of such cases is *Meyer v. Nebraska*.[38] In that case, the Supreme Court upheld the parents' right to have their children taught their native German language in American schools.[39] In upholding this right, the Court referred to the social structure discussed in Plato's *Republic* where parental custody and control of children was to be replaced entirely by state child-rearing activities such that "no parent is to know his own child, nor any child his parent. . . ."[40] Discussing that system, the Court responded:

> Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.[41]

The Court thus concluded that the "liberty" guaranteed by the fourteenth amendment protects the right of the *individual* "to marry, establish a home and bring up children. . . ."[42] Although the *Meyer* Court did not clearly articulate its reasoning regarding the constitutional protection afforded parental rights, this newly forged right was reaffirmed and given substance in *Pierce v. Society of Sisters*.[43]

In *Pierce*, the Supreme Court overturned an Oregon statute requiring compulsory public education of children.[44] The Court based its decision on the parents' due process right to be free from unreasonable state interference in raising their children as they saw fit.[45] The Court denied that the state had the "general power . . . to standardize its children. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[46] Thus, the *Pierce* Court further limited the power of the state to interfere with child-rearing decisions.

More recently, in *Wisconsin v. Yoder*,[47] the Supreme Court upheld parental claims, based on grounds of both religious and parental auton-

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52 (1961) (Harlan, J., dissenting); Prince v. Massachusetts, 321 U.S. 158, 166 (1944). To Justice Goldberg, "[t]he entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of a similar order and magnitude as the fundamental rights specifically protected." Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring).

38. 262 U.S. 390 (1923).
39. *Id.* at 400-03.
40. *Id.* at 401-02.
41. *Id.* at 402.
42. *Id.* at 399.
43. 268 U.S. 510 (1925).
44. *Id.* at 534-36.
45. *Id.* at 534-35.
46. *Id.* at 535.
47. 406 U.S. 205 (1972).

omy, to exempt children from state compulsory education laws as applied to children beyond the eighth grade.[48] The Court found secondary education to be at odds with the religious convictions of the Amish parents and an infringement on their parental prerogatives to transmit values; it was thus held impermissible for a state to require Amish children to attend school until age sixteen.[49] More specifically, the Court in *Yoder* said that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirements under the First Amendment."[50] In so holding, the Court noted that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[51]

The *Meyer-Pierce-Yoder* line of cases make it clear that parents have a fundamental right to direct the upbringing of their minor children. In this context, the Constitution extends to parents the right to decide what values and beliefs will be inculcated in their children.[52] What remains to be examined, however, is whether these parental rights exist only when the parents are united in a traditional nuclear family or if these rights can still be present independently of such a structure.

The Supreme Court addressed that question in *Stanley v. Illinois*.[53] At issue in *Stanley* was the constitutionality of a state adoption statute providing that upon the death of their mother, an illegitimate child becomes a ward of the state without a hearing on the parental fitness of the biological father.[54] In holding that the fourteenth amendment entitled the father to such a hearing, the Court stated:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her chidren 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from

48. *Id.* at 234-36.
49. *Id.*
50. Id. at 233. (quoting Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)).
51. *Id.* at 232.
52. *See* Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923).
53. 405 U.S. 645 (1972).
54. *Id.* at 646-48.

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shifting economic arrangements.'[55]

Thus, the *Stanley* Court recognized the right of the biological father, absent a showing of unfitness, to continue to raise his children even though the traditional bond of marriage was absent in this family setting.[56]

The importance of a biological relationship as a basis for extending constitutional protection was made clearer in *Moore v. City of East Cleveland*.[57] In *Moore*, the Court invalidated a zoning ordinance that imposed criminal sanctions on a grandmother living with her two grandchildren.[58] The Court distinguished *Village of Belle Terre v. Boraas*,[59] where the Court upheld the constitutionality of a zoning ordinance that restricted land use to single family dwellings containing no more than two unrelated individuals.[60] The ordinance in *Boraas* differed from the one challenged in *Moore* because:

> [t]he ordinance there affected only *unrelated* individuals . . . East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. . . . When a city undertakes such intrusive regulation . . . the usual judicial deference to the legislature is inappropriate. 'This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'[61]

In addition to making explicit what was only implicit in *Stanley*—the importance of a biological relationship—the Court intimated that the element of tradition played an important role in its decision to extend constitutional protection to the extended family in *Moore*. Justice Powell's opinion for the *Moore* plurality notes that:

> [U]nless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.[62]

Stanley and *Moore* thus suggest that relationships linked biologically or occupying a place in the American tradition functionally similar to that of the nuclear family are constitutionally protected from state interference.

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55. *Id.* at 651 (citation omitted).
56. *Id.* at 658-59.
57. 431 U.S. 494 (1977).
58. *Id.* at 506.
59. 416 U.S. 1 (1974).
60. *Id.* at 9-10.
61. 431 U.S. at 498-99 (quoting Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639-40 (1974)).
62. 431 U.S. at 501 (plurality opinion).

The Court's subsequent decision in *Smith v. Organization of Foster Families for Equality and Reform*[63] reaffirmed the proposition that biological linkage or some connection with tradition does, indeed, constitute a necessary condition for the extension of constitutional protection to certain relationships.[64] *Smith*, however, holds that such relationships are not, by themselves, sufficient to trigger such protection.[65]

In *Smith*, foster parents and a foster parents organization brought suit claiming that New York's procedures governing the removal of foster children from foster homes were unconstitutional.[66] The foster parents specifically asserted that they had "a constitutionally protected liberty interest . . . in the intergrity of their family unit."[67] The Court avoided the question of whether the foster family actually had such an interest by evaluating the removal procedures on the assumption that such an interest existed.[68] Although the Court held that New York's procedures satisfied due process, Justice Brennan, writing for the majority, indicated some of the elements he considered essential to the attainment of constitutional protection.

First, the Court noted that "the usual understanding of family implies biological relationships. . . ."[69] It found, however, that marriage and adoption would also constitute relationships important enough to warrant constitutional protection.[70] Second, the Court noted that the importance of the family stems from the emotional attachments that it involves.[71] Unlike the situation typically present in the traditional family, the ties of the foster parents have their source in state law and contractual arrangements rather than natural law and sentiment.[72] Thus, while reaffirming the importance of a biological relationship and tradition, the Court in *Smith* indicated that significant emotional ties and "natural" rather than state created rights constitute additional factors to be considered in identifying a constitutionally protected relationship. The extent the factor of emotional ties plays in identifying a constitutionally protected relationship was strongly stated in *Quilloin v. Walcott*.[73]

Quilloin, like *Stanley*, involved an unwed father's parental rights.

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63. 431 U.S. 816 (1977).
64. *Id.* at 843-44.
65. *Id.*
66. *Id.* at 839.
67. *Id.* at 842.
68. *See id.* at 847.
69. *Id.* at 843.
70. *See id.* at 843 & 844, n.51.
71. *Id.* at 844.
72. *See id.* at 845. *But see* text & note 70 *supra* (adoption constitutes a constitutionally protected relationship, even though created by state law).
73. 434 U.S. 246 (1978).

In *Quilloin*, the father sought to prevent the adoption of his illegitimate child by the mother's new husband.[74] State law required only the consent of the mother.[75] Although Quilloin was extended notice of the pending adoption proceeding and a hearing on his individual interests in the child, he was denied the right to veto the adoption.[76] In denying Quilloin that right, the Court noted that the father had "never exercised any actual or legal custody over his child, and thus . . . never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child."[77] *Quilloin* may thus be read as suggesting that even though biological parenthood is associated with the traditional family setting, a constitutionally protected parental relationship requires procreation plus substantial support or the establishment of strong emotional ties with the child.[78]

From this spectrum of cases, then, it may be argued that the Court is not concerned with protecting families per se but with protecting individual rights grounded in certain relationships characteristic of the family. Since the rights protected are rights to control or at least participate in certain decisions affecting one's children, the rights may properly be regarded as part of a person's autonomy—the right to participate in the control of important parts of one's destiny through one's own choices. The right of family autonomy is thus a right of individual parental autonomy. As we have seen, however, the nature of the traditional family has greatly affected the way in which this right of individual parental autonomy has been defined. Because of this, the right will be recognized outside the family only if these "family-like" bonds are present: linkage by blood, emotional ties, relationships of support, and bonds recognized by tradition.

It seems clear from those elements isolated by the Court as necessary for a constitutionally protected relationship that the relationship between a divorced parent and his or her child is entitled to such constitutional protection. More specifically, the divorced parent typically possesses the necessary biological relationship stressed by the *Stanley-Moore-Smith* line of cases, has established the emotional ties singled out as controlling by the Court in *Smith* and *Quilloin*, has contributed the substantial support suggested as a relevant factor by the Court in *Quilloin*, has exercised actual or legal custody over the child as stressed

74. *Id.* at 247.
75. *Id.* at 248.
76. *Id.* at 249-50.
77. *Id.* at 256.
78. *But see* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977) (noting that adoptive relationships are "recognized as the legal equivalent of biological" relationships).

by the *Quilloin* Court, and, finally, occupies a place in one of the most traditional relationships of all—that of parent and child.

C. *Joint Custody as a Fundamental Right*

What are the implications of recognizing that the relationship of both divorced parents and their child is entitled to constitutional protection? As noted earlier, the Constitution protects fundamental rights from all but the most compelling interferences by the state.[79] The protected relationship of divorced parents to their child may be characterized as a fundamental right of parental autonomy. Upon divorce, each parent will continue to possess this fundamental right of parental autonomy equally because, even though the family has been dissolved, each parent still retains those "family-like" bonds (*i.e.*, biological relationship, emotional ties, substantial support, the exercise, at one time, of actual or legal custody over the child, and a traditional bond) recognized by the Court as essential to the right.

In adjudicating child custody incident to a divorce, it would appear that the court is faced with an irresolvable conflict between two equal rights—that of the father against that of the mother.[80] But the foregoing analysis suggests that this is to view the whole matter improperly. The right of parental autonomy is not the right of each parent to total or final custody of control[81] over the child. If each parent had such a right, then the conflict between them may indeed be irresolvable.[82] But the conflict between them is by no means irresolvable if we see the right to be not a right to total or final control but rather an equal right to share in the control of the child.[83] Since this is the strongest right possessed by either parent during the marriage vis-à-vis the child, it would be odd indeed to imagine either acquiring an even stronger right after the dissolution of the marriage. Thus, two crucial points emerge to resolve the conflict: (1) The right of each parent must be regarded as equal with that of the other; and (2) The right in question is a right not to total control but rather a right to the same level of control that one had in the marriage—a right to share in the control of the child.

Given the analysis of rights just sketched, the basic question with

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79. *See* text & notes 30-31 *supra*.

80. *See* Note, *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1328 (1980).

81. In this context, the word "control" is merely a shorthand way of describing the complex of parental rights: care, custody, companionship, education, and religious training, to name a few.

82. A conflict between two competing fundamental rights could, of course, be resolved by the assertion of a compelling state interest by one of the parties—e.g., child abuse or neglect by one of the parents. *See* text & notes 27-28 *supra*.

83. *See* text & note 18 *supra*.

respect to custody is now obvious: What legal approach to custody decisions will both secure the rights in question and secure them equally for each parent? Once the question is put this way, its answer is also obvious: a presumption in favor of joint custody.[84] Such a presumption will come as close as possible to leaving the rights and obligations toward the child the same as those that existed during marriage.[85] Unlike an award of custody to a single parent where the rights of the noncustodial parent are considerably more restricted than those of the custodial parent,[86] joint custody is a formal recognition of the equality of the right of each parent. In joint custody, both parents have equal authority and responsibility for all facets of raising the child.[87]

D. *Joint Custody, Harm, and The Best Interests of the Child*

The fundamental right to joint custody,[88] like all rights, merely establishes a presumption—not an absolute and final determination in all cases. It can, for example, be waived by a parent who does not desire custody. Since the right is fundamental, however, it may be overridden by the state only when the state possesses a compelling reason for so doing.[89]

What might such a compelling reason be? It is tempting to think that the state is offering such a compelling reason by citing the principle of "the best interest of the child." But, if the above analysis is correct, that line of thought is mistaken. The fundamental right of parental autonomy arguably is identical both within the traditionally recognized nuclear family unit and outside that traditional family unit so long as

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84. *See* M. ROMAN & W. HADDAD, *supra* note 1, at 173; Note, *supra* note 80, at 1329; Comment, *supra* note 16, at 1120-21.

85. *See* Burge v. City of San Francisco, 41 Cal. 2d 608, 616, 262 P.2d 6, 11 (1953) (joint custody "gives neither [spouse] a greater right than he or she had before the divorce."); Folberg & Graham, *Joint Custody*, 12 U. CAL. D. L. REV. 523, 536-37 (1979); Miller, *supra* note 16, at 360.

86. *See* Folberg & Graham, *supra* note 85, at 525-26; Miller, *supra* note 16, at 355; Mnookin, *supra* note 10, at 233; Comment, *supra* note 18, at 1095-99.

87. *See* authorities cited at note 85 *supra*.

88. Strictly speaking, the fundamental right is not a right to joint custody, but is rather the fundamental right of parental autonomy. From this right, the right to a presumption of joint custody may be derived in much the same way the right to have an abortion may be derived from the fundamental right of privacy. The derivation, detailed in the text, *see* text & notes 35-83 *supra*, may be summarized as follows: Any fundamental right of persons will be an equal right of those persons. *See* U.S. CONST. amend. XIV, § 1. Thus, in any case of conflict or apparent conflict between rights, the presumption must always be in favor of a solution that preserves the equality. *See* Nebraska Press Ass'n v. Stewart, 427 U.S. 539, 561 (1976). If equality cannot be preserved, then the presumption is in favor of the solution that comes closest to maintaining equality. *Id.*

In child custody adjudication following divorce, a presumption of joint custody is required as a matter of right because only such an arrangement preserves equality of the right of parental autonomy. If this presumption is overridden and joint custody cannot be awarded, then the presumption is in favor of whatever custody arrangement best preserves equality—*e.g.*, extended visitation. It is to avoid saying all of this in the text that the short phrase "fundamental right to joint custody" is used.

89. *See* text & notes 27-28 *supra*.

the relationships maintained outside the unit are "family-like" in the previously specified sense.[90] Since the state's right to interfere with these rights within the family is limited by a principle far more restrictive than "the best interest of the child", it is hard to see why state interference should become any less restricted after divorce.[91] Normally, the state may interfere with parental rights only to prevent harm or abuse to the child;[92] it may not interfere on the positive ground that so doing would simply be in the child's best interest.[93] Why should a comparable limitation on state judicial power not be present after divorce as well? Should not the only compelling interest which the state could cite to justify refusing an award of joint custody be the interest of protecting the child from harm?[94] The court must require proof that the child would be harmed by joint custody, not merely that the child's interests might be better served without it.

Even in those cases where it is possible to prove that joint custody will result in harm to the child, the actual custody arrangement imposed, inasmuch as it will restrict the custodial rights of one of the parents, should not be upheld unless it can be demonstrated that such an arrangement is "necessary" to protect the child from harm.[95] In other words, it must be proven that the custodial arrangement is the arrangement "least restrictive" of the rights of the restricted parent. For instance, the projected harm that may justify a refusal of joint physical custody might not be such as to support a radical restriction on other remaining parental rights—*e.g.*, rights to visitation or rights to partici-

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90. *See* text & notes 26-27 *supra*.

91. *See* text & notes 30-31 *supra*. Justice Stewart has described the limits upon the power of a state to interfere in parent-child relationships as follows:

> One of the liberties protected by the Due Process Clause . . . is the freedom to 'establish a home and bring up children'. . . . If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'

Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring).

92. *See* Parham v. J.R., 442 U.S. 584, 604-05 (1979); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Stanley v. Illinois, 405 U.S. 645, 652-53 (1972).

93. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 860-63 (1977) (Stewart, J., concurring); Roe v. Conn, 417 F. Supp. 769, 778-79 (M.D. Ala. 1976); *In re* B.G., 11 Cal. 3d 679, 699, 523 P.2d 244, 258, 114 Cal. Rptr. 444, 457-58 (1974).

94. *See* Devine v. Devine, 213 Cal. App. 2d 549, 551, 29 Cal. Rptr. 132, 134 (1963); *In re* Marriage of McGee, 613 P.2d 348, 350 (Colo. App. 1980). *See also* Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 996-1001 (1975).

95. *See* Devine v. Devine, 213 Cal. App. 2d 549, 553, 29 Cal. Rptr. 132, 134 (1963) ("Because of the importance of the parent-child relationship and the likely benefits to the child as it grows up from reasonable . . . visits with the parent who does not have custody, the courts should not deprive such a parent of all visitation privileges absent a clear showing that any contact with such parent would be detrimental to the child"); *In re* Marriage of McGee, 613 P.2d 348, 350 (Colo. App. 1980) (drastically limited visitation rights for the noncustodial father unreasonable absent a showing that reasonable visitation would endanger the child physically or mentally).

pate in child-rearing decisions. Even in those cases where the presumption of joint custody can be successfully rebutted, it must still be proven that each restriction on remaining parental rights is necessary.

Given this analysis, it is a mistake for courts to continue the tradition of focusing on the best interest of the child in making custody awards. Courts should, instead, concern themselves solely with one basic question: Is joint custody likely to harm the child? It would be much easier to support the claim that joint custody may not be in a child's best interest than to support the claim that joint custody is actually harmful. Thus, the burden placed on those seeking to rebut the presumption of joint custody is much greater than what is normally required in present custody cases; to deny joint custody, it must be demonstrated that such a custodial arrangement would result in probable harm to the child. Such a burden is likely to be very difficult to bear in the vast majority of cases.

Conclusion

This Note has sought to introduce and defend the concept of joint custody as a constitutionally mandated presumption which follows as a corollary to the fundamental right of parental autonomy. Recognition of parental autonomy as a fundamental right proceeds logically from those cases securing to individual parents the right to participate in the control of their minor children. It has been argued that each parent has this right equally prior to divorce, and that the equality of rights between the parents should be retained after divorce. Joint custody is a mechanism for retaining this equality.

Given that the right to joint custody is fundamental, the state may override it only if it has a compelling interest in so doing. It can be argued that, contrary to common assumption, the pursuit of the "best interest of the child" cannot function as a compelling state interest in this context. The only defensible compelling state interest is something much more limited in scope: prevention of harm to the child.

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